STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY MINOR,

Plaintiff-Appellee,

v

CITY OF SYLVAN LAKE, JEFFREY FICK, and OAKLAND COUNTY,

Defendants,

and

MARK SILVER,

Defendant-Appellant.

UNPUBLISHED
November 25, 2014

No. 314220
Oakland Circuit Court
LC No. 2010-109596-NO

JEFFREY MINOR,

Plaintiff-Appellee,

v

CITY OF SYLVAN LAKE, MARK SILVER, and OAKLAND COUNTY,

Defendants,

and

JEFFREY FICK,

Defendant-Appellant.

No. 314230
Oakland Circuit Court
LC No. 2010-109596-NO

JEFFREY MINOR,

Plaintiff-Counterdefendant-Appellee,

v

No. 316793
Oakland Circuit Court
LC No. 2010-109596-NO

CITY OF SYLVAN LAKE,

Defendant-Appellant,

JEFFREY FICK,

Defendant-Counterplaintiff,

and

MARK SILVER and OAKLAND COUNTY,

Defendants.

ON RECONSIDERATION

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

MURPHY, C.J. (*concurring in part and dissenting in part*).

I respectfully disagree with the majority's conclusion that there was no genuine issue of material fact that defendant police officer Jeffrey Fick had probable cause to arrest plaintiff Jeffrey Minor for violation of Sylvan Lake Ordinance, Part II, § 10-69, which makes it "unlawful for any owner to allow a dog to stray beyond his premises unless under the reasonable control of some person." I conclude that there was documentary evidence sufficient to create a factual dispute regarding whether Fick had probable cause to arrest plaintiff for violation of the ordinance. I would hold, however, that the circumstances supported a conclusion that, as a matter of law, Fick had reasonable suspicion to briefly detain plaintiff to investigate a possible violation of the ordinance. And I would also conclude as a matter of law that plaintiff resisted and obstructed Fick during the attempted detention and that Fick therefore had probable cause to arrest plaintiff for resisting and obstructing a police officer in the performance of his duties. I would reverse the trial court's ruling denying summary disposition on that basis, except with respect to the claims of malicious prosecution and intentional infliction of emotional distress (IIED), but only to the extent that they do not pertain to alleged wrongdoing in making the arrest itself.

Officer Fick testified in his deposition that he stopped his patrol car in front of plaintiff's home because he observed the dog "run out – dart out to the road." According to Fick, the dog had been in plaintiff's yard when he first saw the animal, and the dog then ran into the street. The dog went only as far as the middle of the two-lane road. When the dog reached the center of the street, Fick heard plaintiff call for the dog. Fick then observed the dog immediately return to plaintiff in plaintiff's yard. Fick later changed his testimony slightly, recalling that he may not have heard plaintiff call for the dog as his windows were rolled up, but the dog did quickly return to plaintiff's property after first reaching the middle of the road. Fick claimed that he then rolled

down his window and asked plaintiff his name and whether the dog belonged to plaintiff. Fick testified that plaintiff answered the questions. According to Fick, plaintiff acted "upset" in responding to his questions. Fick exited his patrol car to find out why plaintiff was upset and to issue plaintiff a ticket for violation of the ordinance. While Fick testified that the dog's actions in briefly darting into the road was not a big deal and that he would ordinarily have just given a warning, he chose to exercise his discretion and issue plaintiff a ticket.[1]

Plaintiff testified that he was caring for the neighbor's dog, Molly, and that the dog was standing next to him in his driveway while plaintiff gardened and carried on a conversation with another neighbor who lived and was standing directly across the street from plaintiff's home. Plaintiff then turned away from the neighbor to attend to his gardening, and shortly thereafter plaintiff heard the neighbor yell, "No, Molly." Plaintiff testified that he spun around and saw Molly entering the street, at which time plaintiff yelled for her to get back. According to plaintiff, the dog quickly scampered back onto plaintiff's driveway, and plaintiff grabbed Molly by the collar and started leading her back to his home for a time-out. Plaintiff testified that it was then when Officer Fick rolled down his window and told plaintiff that they needed to talk. Plaintiff further testified that he informed Fick that he first needed to take the dog into the house and then they could talk. Plaintiff acknowledged that he was upset, but this was because Molly had run into the street and plaintiff was responsible for the dog. Plaintiff answered some initial questions posed by Fick, but then realized that Fick was being malicious and trying to give plaintiff a hard time. The majority opinion accurately describes what occurred thereafter, and plaintiff's conduct and actions can only be characterized as resisting and obstructing an officer in the performance of his duties. See MCL 750.81d.[2]

We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of governmental immunity and the statutory exceptions to immunity are likewise reviewed de novo on appeal. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011). MCR 2.116(C)(7) provides for summary disposition when a claim is "barred because of . . . immunity granted by law . . . ." The movant may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The complaint's contents must be accepted as true unless contradicted by the documentary evidence. *Id.* This Court must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in

[1] The prosecutor who handled the criminal charges against plaintiff testified in her deposition as follows: "[T]his is what I gathered from talking to Officer Fick, no one had ever been taken into custody or arrested for a dog at-large violation, that had never happened before."

[2] MCL 750.81d did not "abrogate[] the common-law right to resist illegal police conduct." *People v Moreno*, 491 Mich 38, 41; 814 NW2d 624 (2012). As explained below, I conclude, as a matter of law, that Fick made a lawful command to briefly detain plaintiff.

MCR 2.116(C)(7) is a question of law for the court to decide." *Id.* When, however, a relevant factual dispute does exist, summary disposition is not appropriate. *Id.*

As a preliminary matter, I wish to speak to the issue concerning jurisdiction, which, in my view, implicates the law of the case doctrine. The majority rejects plaintiff's argument that we lack jurisdiction over defendants' appeal as of right. Plaintiff contends that the trial court's order was not an order denying summary disposition on the basis of governmental immunity, as is necessary to trigger an appeal by right under MCR 7.203(A)(1) and MCR 7.202(6)(a)(*v*). As pointed out by plaintiff in his motion for reconsideration, the prior panel that heard the first appeal in this very case ruled that it could not address defendants' argument that probable cause existed, given that the issue of probable cause implicated MCR 2.116(C)(8) and not MCR 2.116(C)(7) and was thus not a matter of governmental immunity. *Minor v City of Sylvan Lake*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2012 (Docket No. 302166), slip op at 7 n 8. More specifically, the previous panel observed:

> Defendants' assertion that probable cause existed as a matter of law and precludes plaintiff from establishing the elements of false arrest and imprisonment, abuse of process and intentional infliction of emotional distress. However, that argument would be based upon MCR 2.116(C)(8), not (C)(7), and defendants' motion was based on (C)(7). . . . Defendant's argument regarding probable cause does not relate to whether these defendants are entitled to governmental immunity. [*Id.*]

At the trial level, and prior to the initial appeal, defendants argued lack of probable cause under both MCR 2.116(C)(7) and (8). The trial court rejected the probable cause arguments, including for purposes of immunity under MCR 2.116(C)(7). And on appeal to the first panel, defendants specifically argued that they were entitled to governmental immunity under MCR 2.116(C)(7) because there was probable cause to arrest. In that procedural posture and based on the quotation above, this Court clearly refused to address defendants' probable cause-(C)(7)-immunity claim, finding that the question of probable cause did not concern immunity but went solely to whether a claim was stated relative to MCR 2.116(C)(8). Thus, there is indeed a law of the case problem. See *Grace v Grace*, 253 Mich App 357, 362-363; 655 NW2d 595 (2002) ("The law of the case doctrine provides that if an appellate court has decided a legal issue and remanded the case for further proceedings, the legal issue determined by the appellate court will not be differently decided on a subsequent appeal in the same case where the facts remain materially the same.").

Moreover, especially with respect to the state law claims, the issue of probable cause does not appear to relate to the question of immunity. A governmental employee has immunity from liability with respect to an intentional tort claim, as are involved here, when the conduct at issue occurred during the course of employment, the employee acted, or reasonably believed he was acting, within the scope of his authority, the actions were undertaken in good faith, with an absence of malice, and the conduct was discretionary; all of these elements must be shown. *Odom*, 482 Mich at 480. "The mere existence of probable cause . . . is not the proper inquiry" relative to the question of governmental immunity for intentional torts under MCL 691.1407(3). *Id.* at 481. On the other hand, probable cause would appear to be relevant to the question of immunity relative to the federal claims under 42 USC 1983. "Qualified immunity shields

government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle v Howards*, __ US __; 132 S Ct 2088, 2093; 182 L Ed 2d 985 (2012). Thus, if there was no constitutional violation to begin with, which is ordinarily the case when probable cause exists, immunity would seem to technically shield the defendant, although it could also be said that no cause of action is established in that circumstance.

In light of these concerns and the law of the case doctrine, I would proceed on the basis or assumption that the order denying summary disposition was only appealable by leave granted, followed by this panel concomitantly granting leave, thereby allowing us to reach the merits of the appeal and the question of probable cause in the context of addressing the elements of the causes of action. See *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012).

"If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v City of Lago Vista*, 532 US 318, 354; 121 S Ct 1536; 149 L Ed 2d 549 (2001). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). In *People v Cipriano*, 431 Mich 315, 342; 429 NW2d 781 (1988), our Supreme Court observed:

> An arresting officer's subjective characterization of the circumstances surrounding an arrest does not determine its legality. Rather, probable cause to justify an arrest has always been examined under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved. [Citations omitted.]

Here, in my view, the documentary evidence gave rise to a factual dispute regarding whether Fick had probable cause to arrest plaintiff for violating the ordinance, which is a misdemeanor based on a presumption under the Sylvan Lake Code of Ordinances for ordinance violations that are not specifically designated as civil infractions, such as § 10-69. See Sylvan Lake Ordinance, Part II, § 1-7(b) ("Unless a violation of an ordinance is specifically designated in the text of the ordinance to be a municipal civil infraction, a violation shall be deemed to be a misdemeanor.").[3] Again, § 10-69 makes it a misdemeanor "for any owner to allow a dog to

[3] Sylvan Lake Ordinance, Part II, § 1-7(c)(1)[a] provides:

> A person convicted of violating an ordinance provision punishable as a misdemeanor shall be guilty of a misdemeanor, and shall be sentenced by the court for a period not to exceed 90 days in jail and/or ordered to pay a fine not to exceed $500.00, unless the ordinance corresponds to a violation of state law that is a misdemeanor for which the maximum period of imprisonment is 93 days, in which case the sentence of the court shall be for a period not to exceed 93 days in jail and/or a fine not to exceed $500.00.

stray beyond his premises unless under the reasonable control of some person." Given its misdemeanor status and the possibility of jail time, one must read a *mens rea* element into the ordinance for the reasons explained below, assuming that the word "allow" in the ordinance does not already require some type of criminal intent or knowledge.

"[C]riminal offenses that do not require a criminal intent are disfavored." *People v Tombs*, 472 Mich 446, 453; 697 NW2d 494 (2005). There is a "longstanding presumption that all crimes require criminal intent." *Id.* at 454. The United States Supreme Court "has expressly held that the presumption in favor of a criminal intent or *mens rea* requirement applies to each element of a statutory crime." *Id.* at 454-455. The existence of *mens rea* is the rule of Anglo-American criminal jurisprudence, rather than the exception. *Id.* at 455. Silence with respect to criminal intent does not, by itself, suggest a legislative desire to dispense with the conventional *mens rea* element. *Id.* at 456. "Liability without criminal intent will not be found in the absence of an express or implied indication of congressional intent to dispense with the criminal intent element." *Id.* at 453. The *Tombs* Court then reiterated that "[t]he Court will infer the presence of the [criminal intent] element unless a statute contains an express or implied indication that the legislative body wanted to dispense with it." *Id.* at 454.

I see no express or implied indication in § 10-69 that the city's legislative body intended to dispense with the criminal intent element and make it a strict-liability ordinance. See *People v Janes*, 302 Mich App 34, 37-38; 836 NW2d 883 (2013) (concluding that a statute making it a crime to own a dangerous animal causing injury, MCL 287.323[2], although silent as to criminal intent, must be construed to require proof that the owner knew that his or her animal was dangerous; it is not a strict-liability offense). Indeed, the term "allow," as used in § 10-69, would suggest that criminal liability does not arise unless the owner intentionally permitted his or her dog to stray off the property or had knowledge that the dog was straying and did nothing. See *Random House Webster's College Dictionary* (2001) (first definition for the word "allow" is "to give permission to or for; permit"). Absent a *mens rea* requirement, an individual's dog could bolt from a home's door that was momentarily and accidently left open, with the owner then facing arrest and a potential jail sentence under § 10-69 if the dog runs beyond the property line. In my opinion, the ordinance must be read to encompass only those situations in which a dog's owner intentionally or knowingly allowed his or her dog to stray beyond the premises absent reasonable control of the animal.

Officer Fick's testimony revealed that he merely saw the dog run from plaintiff's property into the street and then immediately return to plaintiff's property. A reasonable juror could conclude that Officer Fick did not have knowledge of facts and circumstances sufficient to warrant a man of reasonable caution that the ordinance had been violated. See *Champion*, 431 Mich at 342 (defining probable cause). A rational view of the evidence might suggest that Fick did not have any or adequate information that would support a conclusion that criminal intent existed or that plaintiff "allowed" the dog to stray from the property. Indeed, Fick's observations and the circumstances could be construed as directly undermining a finding of criminal intent, and plaintiff's account of the incident certainly detracts from a finding that he intentionally or knowingly allowed the dog to stray from the property.

With respect to reasonable suspicion, the Court in *Champion*, 452 Mich at 98-99, observed:

> Police officers may make a valid investigatory stop if they possess "reasonable suspicion" that crime is afoot. Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.
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> A valid investigatory stop must be justified at its inception and must be reasonably related in scope to the circumstances that justified interference by the police with a person's security. Justification must be based on an objective manifestation that the person stopped was or was about to be engaged in criminal activity as judged by those versed in the field of law enforcement when viewed under the totality of the circumstances. The detaining officer must have had a particularized and objective basis for the suspicion of criminal activity.

While I believe that it presents a close call, I would conclude that there was no genuine issue of material fact that Officer Fick had at least reasonable suspicion that the ordinance had been violated, such that he was entitled, minimally, to make inquiry and briefly detain plaintiff for purposes of an explanation. There is no dispute that the dog strayed off of plaintiff's property and that the dog was not under plaintiff's control at the time. Plaintiff had been standing outside with the dog absent any restraints whatsoever, so one might infer that plaintiff was knowingly allowing the dog free reign, although it did not definitively establish as a matter of law that Fick had probable cause to arrest plaintiff under the ordinance. Under the totality of the circumstances, I think reasonable suspicion existed as a matter of law and that it was entirely reasonable for Fick to briefly detain plaintiff, pose some questions to him, and attempt to obtain some answers concerning the officer's observation of the dog running in the street. Officer Fick, therefore, made a lawful command to plaintiff, and I would hold that there was no genuine issue of material fact that plaintiff responded by resisting and obstructing Fick, whom plaintiff knew was a police officer, in the performance of his duties, violating MCL 750.81d. See *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010) (to prove charges of resisting and obstructing under MCL 750.81d, the prosecution must show acts of resistance and obstruction committed by the defendant against a police officer and that the defendant knew or had reason to know that he or she was resisting or obstructing the police officer in the performance of his or her duties); MCL 750.81d(7)(a) ("'Obstruct' includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command."). Accordingly, I would also hold that there was no genuine issue of material fact that Fick had probable cause to arrest plaintiff for resisting and obstructing an officer. I would reverse the trial court's ruling denying summary disposition on that basis, except with respect to the claims of malicious prosecution and IIED, but, as explained below, only to the extent that those claims do not pertain to alleged wrongdoing in making the arrest itself. I would reject the majority's conclusion that Fick, as a matter of law, had probable cause to arrest plaintiff for violating § 10-69.

I agree with the majority's revision or clarification of its holding in regard to the IIED claim. Although an IIED claim predicated on a false arrest cannot be established if there existed probable cause to arrest, *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004), a review of the first amended complaint reflects that it was not specifically based on a false arrest

but upon the allegedly deplorable and abusive treatment received by plaintiff as recounted in several general allegations and adopted by reference in the IIED count. Therefore, the IIED claim, while somewhat limited, survives.

With respect to the state and federal malicious prosecution claims, as embedded in count III of the amended complaint, caselaw indicates that the existence of probable cause to arrest a person does not, in and of itself, defeat a claim for malicious prosecution depending on how the claim is framed. In *Odom*, 482 Mich at 480-481, our Supreme Court discussed state law claims of false imprisonment/arrest and malicious prosecution and noted that the existence of probable cause is relevant to the analysis of the false arrest and false imprisonment claims, as those claims cannot be sustained when an arrest is legal. The Court, citing *Lewis v Farmer Jack Div, Inc*, 415 Mich 212, 218 n 2; 327 NW2d 893 (1982), in support of this contention, did not make the same claim or assertion with respect to malicious prosecution. *Odom*, 482 Mich at 481. Indeed, in *Lewis*, 415 Mich at 218 n 2, the Michigan Supreme Court stated:

> An action for false arrest cannot be maintained where the arrest is legal even if the person arrested is in fact innocent. If the arrest is legal, there has not been a false arrest. A person who has been legally arrested may bring an action for malicious prosecution, but is required to show that the defendant acted with malice.
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> . . .
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> "'[One] who instigates or participates in a lawful arrest, as for example an arrest made under a properly issued warrant by an officer charged with the duty of enforcing it, may become liable for malicious prosecution, . . . but he is not liable for false imprisonment, since no false imprisonment has occurred.'" [Citation omitted.]

With respect to the elements of malicious prosecution, there is no element specifically requiring proof of an absence of probable cause to *arrest*; rather, the plaintiff can establish a malicious prosecution claim by showing a lack of probable cause for the "proceedings," *Friedman v Dozorc*, 412 Mich 1, 48; 312 NW2d 585 (1981), or a lack of probable cause for the defendant's "actions," *Walsh*, 263 Mich App at 632-633, or a lack of probable cause for "the criminal prosecution," *Sykes v Anderson*, 625 F3d 294, 308 (CA 6, 2010). In *Sykes*, *id.* at 310-311, the Sixth Circuit noted that, as distinguished from a claim of false arrest, a claim of malicious prosecution requires consideration of not only whether there existed probable cause to arrest, but whether the defendants had probable cause to initiate and pursue criminal proceedings.

My review of plaintiff's first amended complaint reveals that plaintiff did not base the state and federal malicious prosecution claims solely on the act of his arrest alone, but that he also focused on post-arrest actions that supported a continuing prosecution until it was finally derailed by the prosecutor, not defendants. Plaintiff alleged, "Defendants maliciously initiated *and continued the proceedings*, without any evidence or cause to support such an action." (Emphasis added.) In the complaint, plaintiff also alleged that defendants Fick and Silver "immediately made the decision to pursue a felony complaint and warrant against [plaintiff]

based on false and trumped up allegations regarding [plaintiff's] reaction *after* being arrested over the unleashed dog" and that defendants "purposely waited until Monday to proceed with the arraignment, forcing [plaintiff] to spend two days in jail." (Emphasis added.) Plaintiff argues that defendants Fick and Silver collaborated to solicit and obtain false witness statements for purposes of a file compiled for the prosecution and that Fick lied at the preliminary examination. Providing "intentionally false testimony at [a] preliminary hearing, if proven, would support . . . [a] malicious prosecution claim." *Owens v Carpenay*, 939 F Supp 558, 564 (ED Mich, 1996). Thus, even if the majority's conclusion were correct that there existed probable cause to arrest plaintiff for violation of the dog-leash ordinance, the majority fails to address post-arrest conduct and fails to appreciate that probable cause to arrest does not necessarily defeat the malicious prosecution claims.

I would reverse the trial court's ruling denying summary disposition, except with respect to the claims of malicious prosecution and IIED, but only to the extent that they do not pertain to alleged wrongdoing in making the arrest itself. Accordingly, I would affirm in part and reverse in part. Therefore, I respectfully concur in part and dissent in part relative to the majority's opinion.

/s/ William B. Murphy